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No. 90-1770

In The

Supreme Court of the United States

October Term, 1990

AMERNATIONAL INDUSTRIES, INC.,

Petitioner,

v.

ELECTROEXPORTIMPORT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The petition for certiorari in this case presents two issues to the Court: 1) whether the standard for granting relief under Rule 60(b) to set aside a default judgment imposed as a discovery sanction under Rule 37, is the same as the standard for setting aside a default judgment entered for non-answer or non-appearance, and 2) whether the underlying merits may be reviewed on the appeal of the denial of a Rule 60(b) motion to set aside a default judgment, where there is no appeal from the entry of the default judgment.

The relevant underlying facts of the case are procedural. The plaintiff, Amernational, served a request for production of documents on defendant, Electroexportimport (Electro) on December 12, 1986. By August 2, 1989, the date the district court entered a default judgment against Electro at a hearing to show cause, the request had still not been complied with. During this lengthy interval, Electro had been subjected to three motions for default, the first, for failure to file an appearance and failure to appear at two pre-trial conferences, the second, for failure to pay the sanctions previously ordered by the court and failure to respond to discovery requests and the third, for failure to respond to discovery requests.

Electro missed the deadline for timely appeal of the default judgment. The district court later denied Electro's Rule 60(b) motion to set aside the judgment. The Court of Appeals for the Sixth Circuit reversed the denial of the Rule 60(b) motion, citing abuse of discretion.

REASONS FOR ALLOWANCE OF THE WRIT

I.

IMPORTANCE TO THE FEDERAL COURT SYSTEM

Petitioner urges that there should be a separate, distinct and narrower standard for granting relief from default judgments imposed as discovery sanctions than for default judgments imposed for non-appearance. Such a narrower standard will further the policy to deter discovery abuse expressed by this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The implications of the issues raised in the petition go far beyond the dispute of the parties in the present case: this deterrence policy has obvious and substantial importance to every case tried in the federal court system.

II.

NO COHERENT STANDARD EXISTS AMONG THE CIRCUIT COURTS FOR GRANTING RELIEF FROM DEFAULT JUDGMENTS IMPOSED AS DISCOVERY SANCTIONS

In describing the standard for granting relief from default judgments imposed as discovery sanctions, Electro states that "the law in this area is quite specific," (Brief in Opposition, p. 5) and that Amernational's argument "flies squarely in face of established law." (Brief in Opposition, p. 9) Electro, however, does not offer any cases on point to illustrate this "established law." Every case that Electro cites in purporting to establish an "entire body of law in the area" involves a Rule 60 motion for a default judgment imposed for failure to answer, or for

failure to appear, plead, or otherwise defend. Electro does not cite any cases dealing with the standard of review for motions to set aside default judgments imposed as discovery sanctions.

Amernational has highlighted the many different and conflicting approaches taken by the federal circuits in handling Rule 60(b) motions for relief from default judgments issued as discovery sanctions.

A. Sixth Circuit

In the present case, the Sixth Circuit, in reviewing the district court's exercise of discretion in its denial of a Rule 60(b) motion, applied the same analysis to a discovery default as used for a non-appearance default. The Sixth Circuit made its own findings of fact in applying a three-part test: 1) whether the plaintiff will be prejudiced; 2) whether the defendant has a meritorious defense; and 3) whether culpable conduct of the defendant led to the default. The Sixth Circuit then ruled that Electro had shown "excusable neglect" under 60(b)(1) and "other reason[s] justifying relief" under 60(b)(6). The Sixth Circuit also addressed the merits of the underlying claims and defenses to further buttress its decision.

B. Second Circuit

In *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 8 (2nd Cir. 1987) the Second Circuit stated that relief under Rule 60(b) from a default judgment imposed as a discovery sanction is limited to one of the six grounds specified in the rule. 817 F.2d at 8-9. The Second

Circuit did not substitute its own discretion for that of the district court, and there was no review of the underlying merits of the dispute. The *Kotlicky* court further held that appellate review was limited to whether the trial court abused its discretion.

C. Third Circuit

In *Poulis v. State Farm and Casualty Company*, 747 F.2d 863, 898 (3d Cir. 1984) the Third Circuit used a six-part test for granting relief from a default judgment or dismissal imposed as a discovery sanction: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense.

D. Fifth Circuit

In *Phillips v. Insurance Co. of North America*, 633 F.2d 1165, 1167 (5th Cir. 1981) the Fifth Circuit limited its review of the denial of Rule 60(b) motions to whether the district court abused its discretion. The *Phillips* court did not state what criteria the district court should apply in such cases, but considered and dismissed the appellant's arguments that its actions were in "good faith" and that it did not intentionally disregard the discovery order. The court noted that the merits of the case can not be

appealed by appealing denial of the 60(b) motion. Specifically, the court stated that "appellate review of the denial of such a motion 'must be narrower in scope than review of the underlying order of dismissal so as not to vitiate the requirement of a timely appeal.'" 633 F.2d at 1167 (quoting *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 386 (5th Cir. 1978)).

E. Seventh Circuit

In *Ben Sager Chemicals Int'l, Inc., v. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977) a case involving attorney misconduct and a default judgment entered as a discovery sanction, the Seventh Circuit held:

> In order to qualify for Rule 60(b)(1) relief, the "movant must demonstrate that he has a meritorious defense *and* that arguably one of the four conditions for relief applies – mistake, inadvertence, surprise or excusable neglect."

Ben Sager, 560 F.2d at 809 (quoting *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573, 576 (4th Cir. 1973), emphasis original).

In *C.K.S. Engineers Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984), the Seventh Circuit considered the following factors: 1) "Rule 60(b) relief is applied liberally in the default judgment context only in the exceptional circumstance where the events contributing to the default judgment have not been within the meaningful control of the defaulting party, or its attorney" 726 F.2d at 1206; 2) "the district court must have the default judgment readily available within its 'arsenal of sanctions' in order to ensure that litigants who are vigorously

pursuing their cases are not hindered by those who are not" 726 F.2d at 1206; 3) Rule 60(b) relief must be perceived as an extraordinary remedy "[i]n order for the default judgment to be an effective deterrent against irresponsible conduct in litigation" 726 F.2d at 1206; 4) Rule 55(c) is another remedy available to the defaulting party 726 F.2d at 1206; and 5) the policy of the 7th Circuit that "defaults should be entered only when absolutely necessary, such as where less drastic sanctions have proven unavailing." 726 F.2d at 1206.

The Seventh Circuit in *Inryco, Inc. v. Metro. Eng'g Co., Inc.*, 708 F.2d 1225 (7th Cir. 1983) used an abuse of discretion standard in reviewing a Rule 60(b) motion for relief from a default sanction. The court held that "[t]he decision on a Rule 60(b) motion is left to the broad discretion of the district court" (708 F.2d at 1230) and that "default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful" (708 F.2d 1230, citing *A.F. Dormeyer Co., v. M.J. Sales & Distributing Co.*, 461 F.2d 40, 43 (7th Cir. 1972). Finally, the court noted that Rule 60(b) is "reserved for extraordinary relief" and that "a litigant therefore must show exceptional circumstances to justify overturning the default judgment." 708 F.2d at 1230.

Finally, in *United States v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989) the Seventh Circuit stated that the test under Rule 60(b) to vacate a default judgment entered as a discovery sanction required defendants to show: 1) good cause for their default; 2) quick action to correct it; and 3) a meritorious defense to the plaintiff's complaint. 879 F.2d at 1495.

The *DiMucci* court found that a delay of 10 months by the defaulting party constituted prejudicial delay which "seriously hampered [plaintiff's] trial preparations." 879 F.2d at 1494 (citing *Hindmon v. National-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 621 (7th Cir. 1982). This statement conflicts with the Sixth Circuit's holding in the present case that "delay alone is not a sufficient basis for establishing prejudice." (quoting *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983). Meritorious defenses were not considered by the Seventh Circuit in *DiMucci* because no "good cause" was shown for the default.

F. Ninth Circuit

United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265 (9th Cir. 1985) addressed a situation where a party appealed from both a Rule 37(b) dismissal and a denial of a Rule 60(b) motion. The Ninth Circuit considered several factors in reviewing Rule 37 dismissal sanctions. First, the district court must have considered lesser sanctions before granting a dismissal sanction. Second, the Rule 37 dismissal sanction was appropriate "only where the failure to comply is due to willfulness, bad faith, or fault of the party." 771 F.2d 1270 (quoting *Wyle v. R.J. Reynolds Ind., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). Finally, in reviewing dismissal sanctions, the Ninth Circuit used an abuse of discretion test, requiring a "definite and firm conviction that a clear error of judgment was made by the court below" for reversal. 771 F.2d at 1270.

The Ninth Circuit, in *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988), considered an appeal from a Rule 37(b) dismissal sanction and denial of a Rule 60(b)

motion. The court of appeals listed five factors that a district court must consider before imposing the dismissal sanction: "1) the public's interest in expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy favoring disposition of cases on their merits; and 5) the availability of less drastic sanctions." 862 F.2d at 1385.

This confusion, evidenced in both the wide spectrum of approaches in reviewing Rule 60(b) motions involving default judgments imposed as discovery sanctions in the courts below – as well as in opposing counsel's brief, is a strong indication of the necessity for this Court to review the issues raised in this petition.

III.

THE UNDERLYING MERITS OF THE DEFENDANT'S CASE MAY NOT BE REVIEWED ON APPEAL OF A RULE 60(b) MOTION WHERE THERE IS NO APPEAL FROM THE ENTRY OF THE DEFAULT JUDGMENT.

Electro argues that, on appeal of a Rule 60 motion to vacate a default judgment where no appeal has been taken on the default judgment, the merits of the defaulting party's case must be reviewed. (Brief in Opposition, p. 9) This argument is directly contrary to the settled law. Where no appeal has been taken from a judgment, but instead appeal is taken only from denial of a Rule 60(b) motion, the scope of review is limited to whether the lower court abused its discretion in ruling on the motion. *Browder v. Director, Dep't of Corrections of Illinois*, 54 L.Ed.2d 521, at 530 n.7 (1978). The merits are not considered.

CONCLUSION

It is requested that this Court review this case to preserve the control of the district courts over the discovery process.

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, summary reversal of the decision of the Court of Appeals should be ordered.

Respectfully submitted,

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